

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

E.D., by and through her parents, :
T.D. and C.D., and T.D. and C.D., :
individually :
 :
 : CIVIL ACTION
v. :
 :
 : NO. 09-4837
COLONIAL SCHOOL DISTRICT :

MEMORANDUM

SURRICK, J.

MARCH 31, 2017

Presently before the Court is Defendant Colonial School District’s Motion for Judgment On the Administrative Record And For Summary Judgment (ECF No. 16), and Plaintiffs E.D., T.D., and C.D.’s Motion for Summary Judgment On The Supplemented Administrative Record On Count I Of The Complaint, And Partial Summary Judgment On The Issue Of Liability On Counts II And III Of The Complaint (ECF No. 17). For the following reasons, Defendant’s Motion will be granted, and Plaintiffs’ Motion will be denied.

I. BACKGROUND

In this lawsuit, T.D. and C.D., individually, and on behalf of their daughter, E.D., allege violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (“IDEA”) and Section 504 of the Rehabilitation Act, 20 U.S.C. § 794(a) (“Rehabilitation Act” or “Section 504”). Plaintiffs contend that Defendant Colonial School District denied Plaintiff E.D., who suffers from learning disabilities, a free appropriate public education (“FAPE”) during her Kindergarten and First Grade school years. Plaintiffs unsuccessfully asserted these claims at the administrative level. On August 29, 2009, after a due process hearing that spanned six sessions, a Pennsylvania Special Education Hearing Officer concluded that Plaintiffs were not entitled to tuition reimbursement and compensatory education. In this action, Plaintiffs seek reversal of the

Hearing Officer's determination. Plaintiffs also assert claims for retaliation and interference under Section 504. The parties now each move for summary judgment.

A. Factual Background

1. 2006-07 School Year and Summer of 2007

E.D. is a minor who resides with her parents, T.D. and C.D., in the Colonial School District. (Compl. ¶ 5, ECF No. 1.) For the school year of 2006-07, following several years of nursery school, E.D. enrolled in Plymouth Elementary School ("Plymouth"), which is under Defendant's supervision. At the time, E.D. was three months past her fifth birthday. (Hr'g Dec. 13, Pl.'s Mot. Ex. 1, ECF No. 17.) She was one of the younger members of the class. (*Id.* at 2.)

Fewer than two months into the 2006-07 school year, E.D.'s kindergarten teacher noticed that E.D. was "having a lot of difficulty keeping up with the curriculum." (Statement of Concern, ECF No. 18-2 at 17.) In a Statement of Concern dated October 20, 2006, the teacher wrote that "[E.D.] is unable to write her name or other letters of the alphabet." (*Id.*) In addition, her teacher noted that E.D. seemed "very immature in the way she speaks/interacts with other children." (*Id.*)

E.D.'s parents were aware that their daughter was having trouble. E.D.'s teacher noted that E.D.'s mother, T.D., "realized that [E.D.] cannot do things that other children her age are doing," such as "write [her] name, complete [homework] assignments, draw recognizable pictures, [and] write letters of the alphabet." (*Id.* at 44.) T.D. was concerned because E.D. had been enrolled in preschool prior to beginning kindergarten. (*Id.*) The teacher recommended that E.D.'s progress be monitored, that she be given extra practice in handwriting, and that E.D. should receive personalized help during "Kid Writing."¹ E.D. was referred to the Student

¹ "Kid Writing" is a phonics program that teaches children how to write before they learn

Support Team (“SST”)² in order to determine how best to proceed.

Pursuant to the referral, the SST met with T.D. and C.D. on November 9, 2006. (SST Report, ECF No. 18-2 at 19.) The SST evaluated E.D.’s progress in several areas. In discussing her written expression ability, the SST noted that she was “not yet drawing recognizable pictures,” but was able to “write one beginning letter for each word in her story” when her teacher worked with her one-on-one. (*Id.* at 20.) E.D.’s teacher further noted that she had been devoting extra attention to E.D.’s handwriting in the hope of improving her legibility. (*Id.* at 21.)

The SST discussed E.D.’s poor performance in mathematics, noting that she was having difficulty with number writing, simple addition and subtraction, and number patterns. (*Id.*) The SST pointed to speech and language issues, including difficulty articulating speech sounds, difficulty understanding conversations, and unusual voice quality. (*Id.*) Finally, the SST noted that E.D. had difficulty paying attention and staying on task. (*Id.* at 22.)

In prescribing future action, the SST suggested that Kid Writing improvement should be E.D.’s primary goal. (*Id.* at 14-15.) The SST recommended that E.D. receive an “OT (occupational therapy) screening” and a “speech screening,” and that ongoing interventions continue. (*Id.* at 15.) The SST proposed a follow-up meeting at the end of March 2007. (*Id.*)

In January 2007, Defendant conducted a speech and language evaluation of E.D. The evaluation confirmed that E.D. suffered from a speech and language impairment that affected both her receptive and expressive language skills, and placed her significantly below her peers. (Hr’g Dec. 3, ¶ 4.) This diagnosis led Defendant to conclude that E.D. was eligible for

how to read.

² The SST “screens children in the early elementary years (K-3) who are struggling with school-related skills and develops strategies to support the classroom teacher in addressing the identified needs within the classroom.” (Hr’g Dec. 5 ¶ 19.)

supplemental educational services under the IDEA. (*Id.*) Further assessment in February 2007 indicated that E.D. was scoring well below average on several speech and language related tests. (First IEP, ECF No. 18-1 at 1.)

In March 2007, Defendant prepared an Individualized Education Program³ (IEP) to address E.D.'s speech/language disability ("First IEP"), and scheduled it for implementation on March 14, 2007. The IEP was intended to last almost a full calendar year, and expire on March 7, 2008. The IEP noted that E.D.'s "functional performance appears to be age-appropriate," but that her speech and language difficulties were impacting her classroom performance. (*Id.* at 4-5.) The IEP also noted that, according to her recent report card, E.D. was "proficient in reading," while her math skills ranged from "below basic" to proficient. (*Id.* at 4.)

The First IEP prescribed several program modifications designed to accommodate E.D.'s needs. First, E.D. was to receive six monthly sessions of small group instruction, each lasting thirty minutes. Second, E.D.'s classroom teacher and speech therapist were to engage in "collaboration" once a month. Third, the First IEP recommended that the classroom teacher repeat directions, break directions into smaller steps, use graphic cues, and give verbal praise and reinforcement to encourage E.D.'s progression in the classroom. (*Id.* at 9.)

The First IEP determined that E.D. was not eligible for an Extended School Year program ("ESY"), because she was "newly enrolled in speech and language support services." (*Id.*) The First IEP alluded to a lack of data as a factor in making this determination, saying that data collected in the future would be used to determine her eligibility for ESY programming. (*Id.*) The IEP team determined that ESY was not necessary to provide E.D. with a FAPE as

³ An IEP is a written plan, created by a multi-disciplinary team, setting forth "the package of special educational and related services designed to meet the unique needs of the disabled child." *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 526 (3d Cir. 1995) (citation omitted).

guaranteed by the IDEA. (*Id.* at 9-10.)

E.D. was more extensively evaluated by the SST over the ensuing months, and a report was prepared on August 7, 2007.⁴ (SST Evaluation, ECF No. 18-1 at 14.) This report was substantially more detailed than the March 2007 report. The report was based on conversations with E.D.'s teacher and parents, input from various specialists who had worked with E.D., and observation of E.D. in the context of the classroom environment. (*Id.* at 20-21.) The report first noted that E.D.'s behavior, and both her teacher's and parents' description of that behavior, strongly suggested that E.D. suffered from Attention Deficit Hyperactivity Disorder (ADHD). (*Id.* at 23.) The report analyzed various tests, which had been administered to E.D. over the course of the prior months, and discussed progress that had resulted from the speech and language accommodations, which had been incorporated into E.D.'s curriculum pursuant to the First IEP. The report noted the scant progress that E.D. had made in math over the course of the year. (*Id.* at 7.) In addition, the report declared E.D. to be "not proficient" in reading and writing. (*Id.*) The report concluded that E.D. was in need of specially designed instruction due to her speech and language disability. (*Id.*) Notably, the report did not find that E.D. was eligible for additional disability categories. (*Id.*)

E.D. made some progress by the end of the 2006-07 school year. In response to being asked to list her daughter's strengths, E.D.'s mother noted on a Parental Input Form that E.D. "has come a long way since September, is able to write her name and read some sight words," and that she "[k]nows her numbers."⁵ (Hr'g Dec. 6, ¶ 24; Parental Input Form, ECF No. 18-1 at

⁴ Plaintiffs contend that the school psychologist's report prepared as part of the SST evaluation "changed significantly from an earlier draft to the final draft." (Pl.'s Mot. ¶ 38.) The facts presented here are based on the final draft.

⁵ The Hearing Officer erred in saying that E.D.'s parents had submitted the Parental Input

13.) E.D.'s mother, in the same document, noted her daughter's "lack of progression compared to children her age." (*Id.*) E.D.'s Kindergarten report card, which spotlighted some of E.D.'s progress, indicated that E.D. was having difficulty in a number of academic areas. (Kindergarten Report Card, ECF No. 18-2 at 10-11.) Her end-of-year assessments indicated that E.D. was "not proficient" in reading, with her Rigby score of 0 unchanged from her mid-year and beginning of year assessments. (SST Evaluation 16.) E.D.'s Kindergarten teacher testified at the due process hearing that E.D. made progress during the Kindergarten year in the areas of story retelling and name writing, recognizing high frequency words in print, producing beginning sounds in words, recognizing rhyme, recognizing numbers using pictures, and identifying the concepts of time. (Hr'g Tr. 649-51; *see also* Hr'g Dec. 6.) E.D.'s teacher also testified that E.D.'s reading and writing skills showed progress. (Hr'g Tr. 661, 659.)

2. 2007-08 School Year and Summer of 2008

E.D.'s struggles continued during the 2007-08 school year. She had difficulty adapting to the academic curriculum and social pressures of first grade. A series of e-mails exchanged internally among school officials in February 2008 casts doubt on the rate of E.D.'s progress. Discussing a doctor's recent diagnosis that E.D. did not have ADHD, but was likely to "never live a normal life," E.D.'s learning support teacher, Debra Quaco, and other school officials again noted that E.D.'s behavioral problems were likely at the root of her academic struggles.⁶

Form in April 2009. The form was in fact submitted in April 2007.

⁶ According to one e-mail, the doctor, a pediatric neurologist, "told [E.D.'s parents] that [E.D.] will never live a normal life, will need to live in a group home, and that she only has a year or two in which she can 'catch up' or she will need special ed for all of her life." (*Id.* at 33.) We assume this diagnosis contributed to Plaintiffs' sense of urgency in this matter. School officials dismissed this diagnosis, suggesting that the doctor should be reported to the AMA (American Medical Association), and finding it "incredible that anyone feels they can predict this child's future when she is in first grade, and has received spec ed for less than a year." (*Id.*)

(Pl.'s Mot. Ex. 5, ECF No. 17-5 at 32-33.) Quaco noted that E.D. was immature, and that second grade would be a challenge for her "socially." (*Id.* at 32.) (emphasis in original). In assessing her academic progress, Quaco noted that in terms of reading and writing, E.D. seemed to be at a Kindergarten level, though Quaco attributed some of her proficiency to having memorized sight words. (*Id.*) In math, Quaco stated that E.D. was between kindergarten and first grade in proficiency, but noted that when E.D. had difficulties, she modified her activities by employing "much smaller numbers." (*Id.*) Quaco and other school officials discussed the possibility of retaining E.D. in first grade for the 2008-09 school year, "if the parents request." (*Id.*) The basis for such a proposal seems to have been concerns about E.D.'s social and behavioral problems; academics was not cited as a reason.

In April 2008, Plaintiffs requested copies of all educational records related to E.D. (ECF No. 18-2 at 23-24.) During the same month, E.D. was evaluated and determined to be in a "weak range" in a variety of aptitude, reading, writing, and math tests. (ECF No. 17-3 at 11-14.) In June 2008, a Functional Behavior Assessment conducted on E.D. noted a range of social and behavioral problems. (ECF No. 17-3 at 1-9.) According to this assessment, E.D. was struggling to pay attention and remain focused, was frequently disruptive in class, and seemed to exhibit "babyish" behavior. (*Id.* at 1.) The assessment suggested that the behavior could be related to academic, social, and communication skills deficits. (*Id.* at 8.)

Initially, Defendant determined that E.D. was not eligible for ESY programming during the summer of 2008. (Hr'g Dec. at 8, ¶ 39.) After Plaintiffs requested that Defendant reconsider its decision, Defendant offered, as an alternative, a Notice of Recommended Educational Placement (NOREP) in reading for the summer of 2008. (*Id.*) E.D. participated in Defendant's reading instruction summer programs, and was accompanied by a teacher to provide

individualized support. (*Id.*) It appears that E.D.’s reading ability may have been below the threshold for many ESY programs in reading. (*Id.*)

A recurring problem throughout 2007-08 was E.D.’s difficulties with motor and sensory skills expected of a child her age. Throughout 2007-08, an OT specialist visited E.D.’s classroom on a weekly basis, working with all students. (Hr’g Dec. 7, ¶ 35.) Testimony provided at the Due Process Hearing indicated that E.D.’s teacher frequently requested that the OT specialist work with E.D. to address her motor skills deficiencies and provide appropriate sensory instruction. (*Id.* ¶¶ 35-36.) In August 2008, following internal discussions among school officials and prompting by E.D.’s parents, Defendant provided an independent OT/Sensory Integration and Praxis Test (“SIPT”) evaluation. (ECF No. 16 at 13.) This appears to have been the first time that E.D.’s sensory abilities were formally considered as part of the development of appropriate educational plans.

3. *Preparations for the 2008-09 School Year*

In August 2008, the Defendant offered its final IEP (“Third IEP”) for E.D.’s second grade year. (Hr’g Dec. 8, ¶¶ 40-44.) The IEP articulated 27 goals in a variety of areas, including in OT and social skills areas. (*Id.* ¶¶ 42, 44.) Plaintiffs then elected to withdraw E.D. from Plymouth, and enroll her in a private school for the 2008-09 school year.

Plaintiffs sought to have an expert, Dr. Daniel Cane, Ed.D. (“Dr. Cane”), observe classes at Plymouth to determine if they were an appropriate fit for E.D.⁷ (ECF No. 21 at 11.) Defendant initially agreed to allow Dr. Cane to observe and evaluate the program. However, in a December 7, 2008 e-mail from Defendant’s then-counsel, Sharon Montanye, to Plaintiffs’

⁷ The parties have stipulated that Dr. Cane is an expert in school psychology. (ECF No. 21 at 11; Compl. ¶ 32.)

counsel, Defendant informed Plaintiffs that Dr. Cane would not be permitted to conduct an evaluation. (ECF No. 17-5 at 38.) Defendant suggested that “the intention of Dr. Cane’s visit was for the purpose of developing an expert report for litigation purposes” and not for evaluating the school’s ability to accommodate E.D.’s needs. (*Id.*) Defendant further noted that it would not “entertain requests for reimbursement for [Dr. Cane’s] services,” because Defendant believed that the purpose of Dr. Cane’s visit was litigation-related. (*Id.*) E.D.’s parents do not contest that Dr. Cane’s visit was intended, at least in part, to assist them in exercising their procedural rights under the IDEA.⁸ Dr. Cane charged Plaintiffs \$840.00 for services rendered in anticipation of his planned visit to Plymouth. (*Id.* at 44.)

B. Procedural History

In March 2009, Plaintiffs requested a due process hearing seeking tuition reimbursement for the 2008-09 school year, as well as compensatory education for the 2006-07 and 2007-08 school years and ESY periods. (Hr’g Dec. at 2.) The due process hearing occurred over six sessions between May 1 and July 13, 2009. (*Id.*) The record closed on August 14, 2009, and the Hearing Officer issued a decision on August 29, 2009. (*Id.* at 1.)

On October 21, 2009, Plaintiffs filed a Complaint (ECF No. 1), seeking review of the Hearing Officer’s decision, the award of compensatory education under the IDEA, as well as additional compensatory damages, expert fees, and damages for interference and retaliation under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.⁹

⁸ We draw this conclusion from Paragraph 32 of the Complaint and Plaintiffs’ Response to Defendant’s Motion for Summary Judgment (ECF No. 22 at 24), which discuss Dr. Cane’s planned visit. Plaintiffs maintain that Defendants’ behavior adversely affected their procedural rights, but they do not allege that it impeded E.D.’s access to FAPE.

⁹ Plaintiffs are no longer pursuing their claim for tuition reimbursement for the 2008-09 school year. (Compl. at 1 n.1.)

Defendants moved for Judgment on the Administrative Record and for Summary Judgment. (ECF No. 16.) Plaintiffs moved for Summary Judgment as to Count I, and Partial Summary Judgment as to liability for Counts II and III. (ECF No. 17.) Both parties filed responses to the other's Motions. (ECF Nos. 21, 22.) Plaintiffs later added an exhibit to their original Motion (ECF No. 18), and filed Memoranda of Law Regarding Supplemental Authority (ECF Nos. 25, 34). Defendant filed Supplemental Memoranda in Support of its Motion for Judgment on the Administrative Record and for Summary Judgment. (ECF No. 36.)

On March 22, 2017, the United States Supreme Court decided the case *Andrew F. ex rel. Joseph F. v. Douglas County School District*, ___ U.S. ___, 2017 WL 1066260 (Mar. 22, 2017). Plaintiffs and Defendant jointly requested to submit supplemental briefs in light of the *Andrew* case, which addressed the standards to assess FAPEs under the IDEA. The Parties submitted their supplemental briefs on March 30, 2017. (ECF Nos. 40, 41.)

II. LEGAL STANDARD

We review the decision of a Special Education Hearing Officer pursuant to the IDEA under an “unusual” standard, which is sometimes referred to as “modified *de novo*” review. *Shore Reg'l High School Bd. of Educ. v. P.S. ex rel. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004); *P.P. ex rel. Michael P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727, 734 (3d Cir. 2009). A district court reviewing an IDEA decision must make its own findings by a preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(C)(iii). However, we are also bound to accord “due weight” to the Hearing Officer's determinations. *Bd. of Educ. of Hendrick Hudson Central Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206 (1982). Under this standard, we consider the Hearing Officer's factual findings to be “prima facie correct,” and although we are free to accept or reject these findings, we must explain our reasons if we fail to accept them. *S.H. v. State-*

Operated Sch. Dist. of City of Newark, 336 F.3d 260, 271 (3d Cir. 2003). However, when analyzing any live testimony delivered by witnesses before the Hearing Officer, we accord “special weight” to the Hearing Officer’s credibility determinations. *Shore Regional*, 381 F.3d at 199. We are only permitted to overrule findings as to witness credibility if “the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or . . . the record in its entirety would compel a contrary conclusion.” *Carlisle*, 62 F.3d at 529. In this context, the word “justify” requires essentially the same standard of review given to a trial court’s findings of fact by a federal appellate court. *Shore Regional*, 381 F.3d at 199 (citation omitted).

A party is entitled to summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”). The presence of “a scintilla of evidence in support of the [non-moving party] will be insufficient” to carry the case to trial. *Id.* at 252. Where the nonmoving party bears the burden of proof at trial, the moving party may identify an absence of a genuine issue of material fact by showing the court that there is no evidence in the record supporting the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 325 (1986); *UPMC Health Sys. v. Metro. Life Ins. Co.*, 391 F.3d 497, 502 (3d Cir. 2004). If the moving party carries this initial burden, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(c)(1) (“A party asserting that a fact is genuinely . . . disputed must support the assertion by . . . citing to particular parts of materials in the record.”); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)

(noting that the nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts”). “Where the record taken as a whole could not lead a reasonable trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587 (citations omitted). When deciding a motion for summary judgment, courts must view facts and inferences in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255. Courts must not resolve factual disputes or make credibility determinations. *Siegel v. Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1127 (3d Cir. 1995).

When a court is faced with cross-motions for summary judgment, “[t]he rule is no different.” *Lawrence v. City of Philadelphia*, 527 F.3d 299, 310 (3d Cir. 2008). “Cross-motions are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of material fact exist.” *Id.* (quoting *Rains v. Cascade Indus., Inc.*, 402 F.3d 241, 245 (3d Cir. 1968)).

III. DISCUSSION

Plaintiffs move for summary judgment on Count I of the Complaint, which is an appeal of the Hearing Officer’s decision. Plaintiffs also move for partial summary judgment as to liability on Count II (request compensatory damages) and on Count III (retaliation and interference claims). Defendant seeks summary judgment in its favor on all three Counts of the Complaint.

A. Count I: Appeal from Hearing Officer’s Decision

Plaintiffs make three principal arguments in support of their contention that the Hearing

Officer's decision denying their claims should be reversed. First, Plaintiffs contend that there were procedural irregularities that violated their due process rights and caused them prejudice in preparing for the due process hearing before the Hearing Officer. In this regard, Plaintiffs request a spoliation inference as a result of the Defendant's alleged failure to take appropriate steps to preserve evidence once litigation became apparent. In addition, Plaintiffs argue that they were denied access to evidence and an expert evaluation prior to the due process hearing, which caused them to be denied a fair hearing. Second, Plaintiffs argue that the Hearing Officer incorrectly concluded that Defendant did not deny E.D. a FAPE and did not violate its "child find" obligations during E.D.'s 2006-2007, or Kindergarten school year. Finally, Plaintiffs argue that the Hearing Officer incorrectly concluded that E.D. was not denied a FAPE during E.D.'s 2007-08, or First Grade school year. We will address each of Plaintiffs' arguments.

1. Plaintiffs' Claim that Due Process Hearing was Prejudiced by Procedural Irregularities

Plaintiffs argue that the due process hearing was rendered "fundamentally unfair" by procedural irregularities prior to the commencement of the actual hearings. They advance two claims in this regard. First, they argue that Defendant withheld necessary evidence, and they ask for an adverse inference against Defendant based on the alleged spoliation of evidence. Second, they claim that Defendant's denial of access to Plaintiffs' expert, as well as Plaintiffs' inability to use allegedly withheld evidence, violated "fundamental notions of fairness." Plaintiffs ask that we question the fairness of the prior proceedings themselves.

Decisions made by hearing officers "shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. § 1415(f)(3)(E)(i). However, in matters alleging a procedural violation, a hearing officer may find that a child did not receive a [FAPE] only if the procedural inadequacies (I) impeded the child's

right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii).

a. Spoliation Inference

Plaintiffs claim that they deserve a spoliation inference because Defendant "failed to take appropriate steps to preserve evidence in this case." (ECF No. 17 at 24.) Plaintiffs state that "although [Defendant] knew no later than August 28, 2008 that litigation was likely, it did not implement a litigation hold until February 1, 2010." (*Id.* at 25.) Defendant responds that the e-mails in question do not qualify as "education records" under the relevant statutory definition, and that therefore they are not relevant evidence for these purposes. (ECF No. 21 at 4.)

"The unexplained failure or refusal of a party to judicial proceedings to produce evidence that would tend to throw light on the issues authorizes, under certain circumstances, an inference or presumption unfavorable to such party." *Gumbs v. Int'l Harvester, Inc.*, 718 F.2d 88, 96 (3d Cir. 1983) (citation omitted). Courts will employ spoliation inferences if there is reason to believe that a party destroyed relevant evidence.¹⁰ Such an inference permits the trier of fact to conclude that the "destroyed evidence would have been unfavorable to the position of the offending party." *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994).

Courts can impose spoliation sanctions for destruction of evidence if: (1) the evidence

¹⁰ We note that "a showing of spoliation may give rise to a variety of sanctions," including "[1] dismissal of a claim or granting judgment in favor of a prejudiced party; [2] suppression of evidence; [3] an adverse inference, referred to as the spoliation inference; [4] fines; [and] [5] attorneys' fees and costs." *AMG Nat'l Trust Bank v. Ries*, No. 06-4337, 2011 U.S. Dist. LEXIS 79361 at *15 (E.D. Pa, July 21, 2011). Plaintiffs here have requested only an adverse inference, and not the more stringent sanctions which the law might permit.

was within the alleged spoliator's control; (2) there has been actual suppression or withholding of the evidence; (3) the evidence was relevant; and (4) it was reasonably foreseeable that the evidence would be discoverable. *Paramount Pictures Corp. v. Davis*, 234 F.R.D. 102, 112 (E.D. Pa. 2005). Even unintentional destruction of evidence, "if the result of unreasonable conduct, subjects a party to sanctions." *Travelers Prop. Cas. Co. of Am. v. Cooper Crouse-Hinds, LLC*, No. 05-6399, 2007 U.S. Dist. LEXIS 64572, at *17 n.28 (E.D. Pa. Aug. 31, 2007). However, courts decline to sanction purely accidental conduct, where the evidence "in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for." *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 334 (3d Cir. 1995) (citation omitted).

It is not clear what evidence Plaintiffs are referring to. Plaintiffs maintain that Defendant "did not suspend overwriting of documents relating to Plaintiffs until February 1, 2010." However, Plaintiffs fail to allege, with any specificity, even one document that might have been "overwritten." We understand the inherent difficulty in articulating the nature and probative value of allegedly destroyed documents. However, we see no evidence here to support a finding that documents were withheld or destroyed.¹¹ In cases where courts have chosen to award spoliation sanctions, it has been clear that evidence was withheld or destroyed. *See, e.g., Baynes v. The Home Depot U.S.A., Inc.*, No. 09-3686, 2011 U.S. Dist. LEXIS 62685, at *12-13 (E.D. Pa., June 9, 2011) (granting spoliation sanctions because defendant had failed to retain video

¹¹ We note that Defendant has proffered a sworn declaration by Andrew Bogely, Chief Information Officer for the Colonial School District, at ECF No. 21 Ex. B. Bogely states that as a matter of policy, the computer systems "maintain[] recoverable e-mail for three years." (ECF No. 21 Ex. B. ¶ 6.) If the litigation hold were placed into effect on February 1, 2010, presumably e-mails prior to February 1, 2007 would have been lost. We do not know if e-mail communications prior to February 1, 2007 were, in fact, lost, or if they might have been relevant to claims in this matter. This allegation remains unclear based on the record before us. For this

surveillance footage of plaintiff's slip and fall); *Ogin v. Ahmed*, 563 F. Supp. 2d 539, 545 (M.D. Pa. 2008) (granting spoliation charge because defendant had destroyed logs from prior to commercial truck accident); *Mosaid Technologies Inc. v. Samsung Elecs. Co., Ltd.*, 348 F. Supp. 2d 332, 333 (D.N.J. 2004) (finding that failure to produce even a single e-mail because of automatic destruction of e-mails and lack of litigation hold justified spoliation inference).

Contrary to Plaintiffs' suggestion, the simple failure to institute a timely "litigation hold" does not, in and of itself, constitute grounds for an adverse inference. See *Bull v. United Parcel Servs., Inc.*, 665 F.3d 68, 79 (3d Cir. 2012) (stating that "a finding of bad faith is pivotal to a spoliation determination"); *Giuliani v. Springfield Twp.*, No. 10-7518, 2015 U.S. Dist. LEXIS 74174, at *13, 21 (E.D. Pa. June 9, 2015) (rejecting argument that defendants' negligent efforts to institute a "feeble" litigation hold results in spoliation inference where plaintiffs failed to show any suppression of evidence).

Plaintiffs have offered no basis from which to conclude that Defendant in any way tampered with or destroyed evidence, nor do we have any reason to believe that Defendant deleted any repositories that might contain evidence. Plaintiffs, as the party seeking an adverse inference, have the burden of establishing that such an inference is justified. Plaintiffs have not satisfied this burden. They have not presented any reason to believe that Defendant acted improperly.

b. Denial of Access to Evidence Prior to Due Process Hearing

We next consider Plaintiffs' claim that Defendant, in denying access to Plaintiffs' expert and in withholding various other evidence, prejudiced Plaintiffs' ability to receive a fair due

reason, these are inadequate factual grounds on which to grant a spoliation inference at this time.

process hearing. Plaintiffs offer four primary means by which Defendant's allegedly improper actions adversely affected their right to a fair due process hearing. First, Plaintiffs claim that "an email from the Director of Pupil Services to the learning support teacher and the school psychologist . . . clearly indicat[ed] that District personnel planned to retain E.D. in first grade because of lack of progress." (ECF No. 17 at 24.) This e-mail, according to Plaintiffs, would have been valuable to impeach the school psychologist's testimony.¹² (ECF No. 17 at 24; ECF No. 17-5 at 32.) Second, Plaintiffs argue that a draft report of the school psychologist's evaluation contains valuable information that was "highly relevant to E.D.'s claims for compensatory education." (ECF No. 17 at 23.) Third, they argue that a withheld document made by E.D.'s learning support teacher in September 2008 offered information that would have affected the hearing officer's decision. (*Id.* at 22.) Fourth, Plaintiffs allege that because Dr. Cane was denied access to a learning support classroom in December 2008, Plaintiffs were unable to prepare a proper case for the hearing. (*Id.* at 26.)

A student challenging educational placement under the IDEA and its implementing statutes and regulations is afforded an array of procedural guarantees. Although "a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a [FAPE]," a hearing officer can, in limited circumstances, find that a child did not receive a FAPE based on procedural violations. 20 U.S.C. § 1415(f)(3)(E). In order to make such a determination on procedural grounds, the hearing officer must find that the "procedural inadequacies (I) impeded the child's right to a [FAPE]; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process . . . or (III) caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii).

¹² There are, in fact, several e-mails in close chronology that discuss this issue.

Parents of a child with a disability must have the “opportunity . . . to examine all records relating to such child . . . and to obtain an independent educational evaluation of the child.” 20 U.S.C. § 1415(b)(1). Parents have a right to “inspect and review the education records of their children.” 20 U.S.C. § 1232g(a)(1)(A). This right includes “the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records,” the right to request that the agency provide copies if failure to do so would affect the parents’ ability to inspect and review, and the right to have a parents’ representative conduct the inspection and review. 34 C.F.R. § 300.613(b). Access to relevant education records is therefore guaranteed, and failure to have such access could constitute grounds for invalidation of the due process hearing if it fit into one of the three categories articulated in the statute. However, “a procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district’s failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.” *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir. 2010).

In order to determine whether Plaintiffs were deprived of their procedural rights, we must first define “education record.” According to the regulations implementing the IDEA, the definition of an education record under the IDEA is analogous to the definition found in the Family Educational Rights and Privacy Act (FERPA). 34 C.F.R. § 300.611(b). FERPA defines “education records” as “records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A).

Addressing first Plaintiffs’ claim that they were wrongfully denied access to the draft report, Plaintiffs have provided no support for the notion that the draft report constitutes an

educational record. We are skeptical that it is. We note that the draft report was clearly a transitional document and still subject to heavy editing and revision. Several guideposts within the document lead us to this conclusion. First, the draft report is dated June 14, 2006, prior to E.D.'s commencement of kindergarten and well before the events described in the report. (ECF No. 17-5 at 13.) Second, the report repeatedly references another student, "Gavin," in two paragraphs toward the end. (*Id.* at 30.) Third, the scores listed in the document do not comport with the written evaluative descriptions therein.¹³ Moreover, there are additional examples of irregularities in the draft report. It is obvious that the draft report was not intended for dissemination or publication, was clearly in a transitional stage, and bears neither real probative value nor any hallmarks of credibility.

The draft report does not fit within the statutory definition of education records. There is no reason to believe that the draft report is in fact "maintained" by Defendant or any of its employees in any meaningful way. It was not circulated among staff, nor were any decisions in regard to E.D.'s educational accommodations made in reliance on the draft report. It was merely the first incarnation of an evaluation that was in the process of being prepared. Plaintiffs offer no evidence that the draft report was shared, or that the preparer transferred possession of the draft report to others at any point. There is no disputed issue of material fact as to the draft report's status as an education record.

We next consider the e-mails from February 2008 concerning the question of whether E.D. should be retained in first grade for the 2008-09 school year. Plaintiffs claim that while

¹³ For example, in discussing "Wechsler Individual Achievement Test" scores, the draft report lists E.D. as having scored a 79 in Math Reasoning, which would place her in the 8th percentile of students her age. However, the report describes this skill as "High Average." *Id.* at 26.

“District witnesses repeatedly testified that they were not going to retain E.D. in first grade,” these e-mails “clearly indicat[e] that District personnel planned to retain E.D. in first grade because of lack of progress.” (ECF No. 17 at 24.)¹⁴

In order to determine whether Defendant was obligated to turn over these e-mails, we must decide whether e-mails, in fact, are “education records” as envisioned by the interlocking statutory schemes at issue here. In response to a similar question, another district court has reached the conclusion that although e-mails might be “education records,” they are not necessarily so. *S.A. v. Tulare Cty. Office of Educ.*, No. 08-1215, 2009 U.S. Dist. LEXIS 88007, at *14-15 (E.D. Cal., Sept. 24, 2009). The court stated that “[a]n email is an education record only if it *both* contains information related to the student *and* is maintained by the educational agency.” *Id.* at *14 (emphasis in original). “The word ‘maintain’ suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database.” *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 433 (2002). E-mails, however, “have a fleeting nature. An email may be sent, received, read, and deleted within moments.” *S.A.*, 2009 U.S. Dist. LEXIS 88007, at *19-20. Unless Defendant kept copies of e-mails related to E.D. as part of its record filing system with the intention of maintaining them, we cannot reach the conclusion that every e-mail which mentions E.D. is a bona fide education record within the statutory definition. These e-mails appear to be casual discussions, not records maintained by

¹⁴ We note that the substance of these e-mails is hardly as damning as Plaintiffs imply. School officials discussed this possibility in the context of “social/immaturity reasons,” not in regard to E.D.’s academic progress. (ECF No. 17-5 at 32.) Furthermore, school officials never discussed retaining E.D. unless E.D.’s parents requested that the school do so. The prospect of retaining E.D. in first grade without her parents’ request and consent was never raised. (*Id.*) Finally, we note that after these e-mails were sent, there seems to have been no additional discussion of the possibility of retaining E.D. in first grade. The argument that personnel at the School District *planned* to do so is, therefore, questionable.

Defendant. Since these e-mails do not qualify as education records to which Plaintiffs are guaranteed a right of access, there was no violation of their procedural rights prior to the due process hearing.

Next, Plaintiffs state that they did not receive a copy of behavioral observations made by E.D.'s teacher on a Behavioral Plan Worksheet dated September 2008 (*see* ECF No. 17 -5 at 7) until discovery began in the instant matter. (ECF No. 17 ¶¶ 42-43.) However, Plaintiffs are not alleging that the District provided inappropriate educational services and programming during the period in which the document was purportedly authored, the 2008-09 school year. Therefore, even if the document was part of E.D.'s education record,¹⁵ the fact that Plaintiffs did not have access to the document in preparing for the August 2009 hearing can hardly constitute a substantive harm to E.D. or her parents. The document has little to no bearing on the question of whether E.D. was denied a FAPE during the 2006-07 or 2007-08 school years. Accordingly, denying Plaintiffs access to the September 2008 Behavioral Plan Worksheet did not constitute a procedural violation of Plaintiffs' rights.

Finally, Plaintiffs contend that denying Dr. Cane access to the learning support classroom constituted a procedural violation. Dr. Cane's visit to a classroom in which E.D. was not enrolled, and in which nobody had any intention of enrolling E.D.,¹⁶ was not compelled by any

¹⁵ Privately kept teacher notes, among other things, are exempted from the universe of education records. 20 U.S.C. § 1232g(a)(4)(B)(i).

¹⁶ As stated earlier, we do not accept Plaintiffs' contention that Defendant planned to retain E.D. in first grade for the 2008-09 school year. Aside from two e-mails which mention the possibility in passing—and even then only if E.D.'s parents were to so “request”—we find no evidence which supports such a conclusion. We therefore do not believe that Dr. Cane's visit to a first grade learning support classroom was compelled by Defendant's pre-stated “Guidelines for Classroom Visitation.” *See* ECF No. 17-8 at 2 (“A parent or a person designated by a parent, may visit a class when (a) the District has specifically recommended that class for their child; (b) the District has assigned the child to that class; or (c) the child is currently placed in that class.”).

procedural or substantive portion of the IDEA, its implementing regulations, or any related statutes. Dr. Cane's visit could not constitute an education record under any applicable definition. Moreover, Dr. Cane's visit could not constitute an independent educational evaluation, since he sought to evaluate a classroom, and not a child. (*See infra* at Part D, 39.) Plaintiffs do not show how Dr. Cane's visit impeded E.D.'s right to a FAPE, significantly impeded E.D.'s parents opportunity to participate in the decisionmaking process, or caused a deprivation of educational benefits. *See* 20 U.S.C. § 1415(f)(3)(E)(ii). Defendant's decision to deny Dr. Cane access to the classroom did not constitute a procedural violation that denied Plaintiffs their due process rights before the Hearing Officer. *R.K. & D.K. v. Clifton Bd. of Educ.*, 587 F. App'x 17, 21 (3d Cir. 2014) (rejecting argument that the school district's refusal to allow the plaintiffs' expert to observe a class violated a right to an impartial due process hearing).¹⁷

¹⁷ Plaintiffs point to a case which they claim is "similar" to the instant matter as support for their argument. (ECF No. 17 at 26-27.) In a case in the Northern District of Illinois, the district court ordered the admission of Plaintiffs' expert to a public school in order to observe a student's educational surroundings, and vacated the due process hearing's results based partially on a procedural violation. *John M. v. Bd. of Educ. of Evanston Twp.*, 450 F. Supp. 2d 880 (N.D. Ill. 2006), *rev'd on other grounds*, 502 F.3d 708 (7th Cir. 2007). This case is markedly different. In *John M.*, the plaintiff's parents sought to have their expert observe their son in the defendant's high school classrooms. Here, E.D. was not enrolled in the classroom which Plaintiffs sought to have their expert observe, and there is no reason to believe that she ever would be enrolled in a first grade learning support classroom at Plymouth again.

2. *Plaintiffs' Claim Regarding Defendant's "Child Find" Obligations and FAPE Provision During 2006-07 School Year*¹⁸

Plaintiffs contend that alleged procedural deficiencies made by Defendant in its evaluation of, and provision of services to, E.D. were a violation of the Defendant's "child find" obligations, which resulted in a denial of FAPE during the 2006-2007 school year. Specifically, Plaintiffs argue that Defendant failed to comply with procedures governing the pre-referral intervention process by not including E.D.'s parents in that process, and by not conducting a systematic behavioral observation of E.D. despite several behavioral issues identified during the initial referral. In addition, Plaintiffs argue that Defendant waited too long to refer E.D. for a comprehensive evaluation in all areas of suspected disability, and improperly limited the first evaluation to speech and language services despite broader observed problem areas. Plaintiffs argue that these procedural deficiencies resulted in substantively inappropriate programming for the 2006-2007 school year, and ultimately, Defendant's denial of a FAPE for E.D.

Such procedural violations only constitute a denial of a FAPE if Plaintiffs can show that their substantive rights are affected. *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3d Cir. 2010) ("A procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.") (citation omitted); *see also* 34 C.F.R. § 300.513(a)(1) (noting that "a hearing officer's determination of

¹⁸ Defendant argues that Plaintiffs' pre-March 2007 claims, including their "child find" claims, are time-barred due to a two-year statute of limitations. (ECF No. 16 at 6.) Plaintiffs contend that because they "do not seek compensatory education for more than two years prior to the filing of the due process complaint, the District's discussion of the statute of limitations is irrelevant." (ECF No. 22 at 26 n.6.) Since Plaintiffs do not seek compensatory education for any harms arising before March 2007, Defendant's Motion as to all Count I claims prior to March 2, 2007 will be dismissed as moot.

whether a child received a FAPE must be based on substantive grounds.”¹⁹

The Hearing Officer concluded that the procedural inadequacies alleged by Plaintiffs did not result in a substantive harm to E.D. or her parents. Specifically, the Hearing Officer concluded that “[t]he evidence establishes that the District’s procedures did not result in a deprivation of educational benefit to Student.” (Hr’g Dec. 12.) The Hearing Officer reached this conclusion after reviewing the evidence and testimony and determining that:

The record in this case establishes that the District did not ignore either Student’s functioning in school or Student’s Parents’ concerns. It screened, intervened, evaluated, added speech/language support and additional classroom supports, and evaluated again during the same school year as it became apparent that Student needed more services to make meaningful progress.

(*Id.* at 13-14.)

The Hearing Officer also concluded that E.D. was not denied a FAPE during the 2006-2007 school year because the evidence showed that she “made significant progress.” (*Id.* at 15.) Plaintiffs request that we reverse this determination made by the Hearing Officer. (*Id.* at 30-31.) Plaintiffs contend that non-testimonial evidence shows that E.D. did not make significant progress, despite the Hearing Officer’s finding that she did. Based upon a review of the Hearing Officer’s report, including the supporting administrative record and the additional exhibits submitted by the parties with their summary judgment motions, we are satisfied that E.D. made

¹⁹ The Regulations further state that:

- In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies –
- (i) Impeded the child’s right to a FAPE;
 - (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or
 - (iii) Caused a deprivation of educational benefit.

34 C.F.R. § 300.513(a)(2).

sufficient progress during her Kindergarten year, and that as a result, was not denied a FAPE.

“A FAPE ‘consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction.’” *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 268-69 (3d Cir. 2012) (quoting *Rowley*, 458 U.S. at 188-89). “‘The provision of merely more than a trivial educational benefit’ is insufficient.” *Id.* at 269 (quoting *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 390 (3d Cir. 2006)). A school district is required to show only that the individual education program would provide a “meaningful educational benefit” and not that it would be the “best possible education.” *S.H. v. State-Operated Sch. Dist. of Newark*, 336 F.3d 260, 271 (3d Cir. 2003). The Third Circuit has recognized that the benefit must be more than merely a *de minimis* one. *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 393 (3d Cir. 1996). Whether a disabled child has benefitted is analyzed on a student-by-student basis. *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 248 (3d Cir. 1999). To ascertain whether a disabled child received a meaningful educational benefit, we look to regular examinations, grades, and advancing from grade to grade as important factors in measuring the educational benefit received by the disabled student. *See Rowley*, 458 U.S. at 201. The burden lies with Plaintiffs to show that E.D. was denied a FAPE since they are the ones that are challenging the administrative decision. *Ridley*, 680 F.3d at 270.

The United States Supreme Court recently adopted a standard for determining when disabled children receive sufficient educational benefits to satisfy the FAPE requirement under the IDEA. *See Andrew F. v. Douglas Cty. Sch. District*, ___ U.S. ___, 2017 WL 1066260 (Mar. 22, 2017). The Court held that “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at *10. The Court rejected the Tenth Circuit’s standard that an

“IEP is adequate so long as it is calculated to confer an educational benefit that is merely . . . more than *de minimis*.” *Id.* at *1 (citation and internal quotation marks omitted). In reaching its holding, the Supreme Court cautioned that:

The reasonably calculated qualification reflects a recognition that crafting an appropriate program of education requires prospective judgment by school officials, informed by their own expertise and the views of a child’s parents or guardians; any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. An IEP is to set out a plan for pursuing academic and functional advancement. And the degree of progress contemplated by the IEP must be appropriate in light of the child’s circumstances, which should come to no surprise.

Id. at *2 (emphasis in original).

Plaintiffs contend that the Hearing Officers’ decision does not pass muster under the heightened standard adopted by the Supreme Court in *Endrew F.* While it is true that *Endrew F.* was decided after the Hearing Officer issued her decision, the standards employed by the Hearing Officer do not differ substantively from the standards adopted by the Supreme Court in *Endrew F.* The Hearing Officer analyzed the administrative record with reference to Third Circuit cases that had already rejected the *de minimis* standard in lieu of a more stringent standard. (See Hr’g Dec. 9 (“An Eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a ‘trivial’ or ‘*de minimus*’ educational benefit.” (citing *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3d Cir. 1988)).) The standard employed by the Hearing Officer required that E.D.’s IEP “specify education instruction designed to meet [her] unique needs” and that it “be accompanied by such services as are necessary to permit [her] to benefit from the instruction.” (*Id.*) The Hearing Officer further stated that “[m]eaningful benefit means that an eligible child’s program affords . . . her the opportunity for significant learning.” *Id.* Based on this standard, the Hearing Officer’s assessment of the administrative record is in accord with *Endrew F.*

Plaintiffs contend that the Hearing Officer erred in concluding that E.D. made significant progress because such a conclusion was based only on selective evidence and was inconsistent with the administrative record as a whole. Contrary to Plaintiffs' contention, the Hearing Officer did not base her conclusion that E.D. made significant progress on only the Kindergarten report card and E.D.'s Mother's assessment that E.D. had "come a long way" since the beginning of the school year. The Hearing Officer also based her conclusion on the testimony of E.D.'s Kindergarten teacher, who testified at the due process hearing that she believed E.D. made progress during her Kindergarten year. Specifically, the teacher believed E.D. made progress in the areas of story retelling and name writing, recognizing high frequency words in print, producing beginning sounds in words, recognizing rhyme, recognizing numbers using pictures, and identifying the concepts of time. (Hr'g Tr. 649-51; *see also* Hr'g Dec. 6.) E.D.'s teacher also testified that E.D.'s reading skills showed progress. In particular, at the beginning of the school year, E.D. was able to identify six letters, and at the end of the year, she could identify thirty-two letters. The Hearing Officer also noted in the Hearing Report that, by the end of her Kindergarten year, E.D. "was able to meet some of the District's kindergarten curriculum standards for math, reading, and writing." (Hr'g Dec. 6.) E.D.'s teacher testified during the hearing that with respect to the curriculum-based assessment in writing, E.D. scored a zero in the beginning of Kindergarten, and scored seventeen at the end of the year, which showed "significant progress." (Hr'g Tr. 661.) In addition, E.D. made progress in all areas of the "DIBELS scores." (*Id.* at 659.)

Plaintiffs point to E.D.'s report card at the end of Kindergarten, and highlight that many of the language-based skills areas revealed no improvement. Some categories remained partially proficient and some categories remained not proficient. However, a review of the report card

reveals that many other language-based and math-based skills areas did show improvement. In these categories, E.D. progressed from not proficient to partially proficient, or from partially proficient to proficient. (Kindergarten Report Card 2.) Plaintiffs also point to the fact that E.D. achieved a reading level of zero at the end of her Kindergarten year, which was considered not proficient. The Hearing Officer reviewed E.D.'s Kindergarten report card and her standardized tests and assessments before reaching her decision. The Hearing Officer noted that although E.D. "was not at the levels expected of a typical student at the end of Kindergarten in terms of standardized assessments of achievement" and that despite "the severity of [her] language disability and the significant needs resulting from it," E.D. did in fact show progress. (Hr'g Dec. 15.) This conclusion is reasonable in light of the administrative and summary judgment records.

Plaintiffs contend that because E.D.'s March 2007 IEP was limited to speech and language and did not take into consideration her deficits in all academic areas, progress could not be had in all areas of E.D.'s need, resulting in a denial of a FAPE. This argument is misguided. Even though the March IEP was limited to speech and language, this was because the school officials and education experts determined that these "skill areas affect development of early academic skills in reading, math and written expression." (Hr'g Dec. 6 (quoting Hr'g Tr. 1443-44, 1450 & S-2).) E.D. was young for her class. Indeed, she entered Kindergarten just three months after her fifth birthday. It was not unreasonable for her teachers and support counselors to limit the March 2007 IEP to E.D.'s known deficiencies—speech and language—when support in these areas could aid progress in all other academic areas, particularly in Kindergarten, when teachers are only just beginning to assess the full scope of their students' academic needs. The March IEP prescribed several program modifications designed to accommodate E.D.'s speech and language needs, such as monthly sessions of small group instruction, collaboration with a

speech therapist, and specific instruction to the classroom teacher to repeat directions, break directions into smaller steps, use graphic cues, and give verbal praise and reinforcement to encourage E.D.'s progression in the classroom. This program shows "prospective judgment by school officials" and was "reasonably calculated to enable [E.D.] to make progress appropriate in light of [E.D.'s] circumstances." *Andrew F.*, 2017 WL 1066260, at *2-3. Plaintiff's argument also ignores the diligent efforts made by Defendant upon realizing that support for E.D. should be wider in scope than just speech and language. In August 2007, only five months after implementing the first IEP, Defendant adopted a more comprehensive IEP that contained goals for reading, math, written expression, attention/behavior, and speech/language.

Plaintiffs invite the Court to conclude that simply because Plaintiff did not progress in all categories on her Kindergarten Report Card, or because she was not proficient in reading, then she was denied a FAPE. This is not consistent with the standard adopted by the Third Circuit or by the Supreme Court in *Andrew F.* For a child like E.D., who was "fully integrated in the regular classroom, an IEP typically should be 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" *Id.* at *2 (quoting *Rowley*, 458 U.S. at 204). There was no question that E.D. made progress, and that she advanced to the First Grade. While it is true that E.D. did not make progress in all categories, this does not mean that she was denied a FAPE.

Our review of the administrative decision requires us to "defer to the hearing officer's findings based on credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless a record read in its entirety would compel a contrary conclusion." *Carlisle*, 62 F.3d at 529. We are bound to consider the Hearing Officer's factual findings to be "prima facie correct," but we are free to reject them. *S.H. v. State-*

Operated Sch. Dist. of City of Newark, 336 F.3d 260, 271 (3d Cir. 2003). Plaintiff has not provided evidence—testimonial or non-testimonial—that undermines the Hearing Officer’s factual findings or conclusions.

Accordingly, Defendant’s request for summary judgment as to the denial of a FAPE during the 2006-2007 school year will be granted.

3. *Plaintiffs’ Claim Regarding Defendant’s FAPE Provision During 2007-08 School Year*

Plaintiffs also argue that E.D. was denied a FAPE during the 2007-08 school year. Specifically, Plaintiffs argue that Defendant failed to address E.D.’s behavioral problems, which prevented her meaningful access to her education. Defendant claims that E.D.’s learning support teacher brought about positive behavioral changes in E.D. during the school year, which allowed for educational progress.

The Hearing Officer outlined the evidence and testimony that addressed Defendant’s strategies for addressing E.D.’s behavioral issues. The Hearing Officer noted that E.D.’s learning support teacher “provided numerous creative instructional strategies to address Student’s academic needs, engaged Student in the learning process and reduced the effects of Student’s attention deficiencies.” (Hr’g Dec. 7.) In addition, “[w]hen Student’s behaviors began interfering with instruction, the learning support teacher developed and successfully implemented behavior interventions to address those issues to the extent possible.” (*Id.*) These observations were supported by numerous excerpts from the hearing transcript and multiple hearing exhibits. Based on this evidence, the Hearing Officer concluded that “[a]lthough Student’s speech/language impairment, attention difficulties and sensory needs interfered with academic learning, Student made slow but steady progress that increased toward the end of the 2007/2008 school year.” (*Id.* at 15.) The Hearing Officer also concluded that “[t]here is

extensive evidence that Student's 1st grade IEP was reasonably calculated to assure progress commensurate with Student's ability and Student's needs, and that Student was able to derive meaningful benefit from Student's education." (*Id.*)

Plaintiffs have not presented any evidence—testimonial or non-testimonial—that contradicts the factual findings and conclusions reached by the Hearing Officer. Plaintiffs point to two documents that they allege support a reversal of the Hearing Officer's conclusions. The first document, which is a summary of the 2007-08 school year prepared by E.D.'s learning support teacher, was submitted at the administrative hearing and considered by the Hearing Officer. In the summary, the learning support teacher described some of E.D.'s behavioral issues, such as her refusal to participate, her rushing through tasks, her lack of focus, and her impulsiveness in calling out answers. Plaintiffs contend that a behavioral functional assessment would have better addressed these behavioral problems. The support teacher's summary of E.D.'s behavioral issues does not support Plaintiff's argument. It only confirms that Plaintiff indeed had behavioral issues during the 2007-08 school year—a point that is not contested by either party. It does not support a position that the District's handling of E.D.'s behavioral issues was inadequate or otherwise contributed to a denial of a FAPE.

The second document relied on by Plaintiffs is the draft Behavior Plan Worksheet that was allegedly not provided to Plaintiffs during the administrative hearing and therefore not reviewed by the Hearing Officer. In the Behavior Plan Worksheet, it was noted that when asked to work independently, E.D. would refuse and talk to a peer, and that this occurred approximately four to five times a day. (Pls.' Mot. Ex. 4, Tab B.) The Worksheet also indicated that behavior issues would occur approximately once per minute during instruction. (*Id.*) Similar to the learning support teacher's summary of the school year, the comments in the

Behavior Plan Worksheet only confirm what is not in dispute, that E.D. had significant behavioral issues. It does not address Defendant's strategies in addressing those issues. Plaintiffs have not provided any evidence that would contradict the Hearing Officer's conclusion that E.D. made progress during the 2007-08 school year, and that she "derived meaningful benefit from" her education. Although these behavioral issues may have affected E.D.'s success, it is not clear from the record that she did not experience academic progress. The non-testimonial extrinsic evidence does not point to a lack of progress.

Furthermore, we are unable to conclude that the programming provided to E.D. in the summer of 2008 was in fact inadequate and inappropriate. The only information we have is contained in the parties' pleadings,²⁰ the hearing decision, and various bits of evidence that we have gleaned from the parties' exhibits. The Hearing Officer made her decision based largely on testimony delivered at hearings. (Hr'g Dec. ¶ 39.) We will not second-guess the credibility of live testimony in the absence of extrinsic evidence to the contrary. *See Carlisle*, 62 F.3d at 529. Because no extrinsic evidence has been proffered which contradicts the conclusion that E.D. derived meaningful educational benefit during the 2007-08 school year and the summer of 2008, we consider the Hearing Officer's decision reliable in this regard and will grant Summary Judgment to Defendant.

B. Count II: Compensatory Damages and Expert Fees

In Count II of their Complaint, Plaintiffs seek money damages and expert fees under

²⁰ Plaintiffs claim that "someone who was involved in E.D.'s summer programming thought that her speech and language impairment was impacting her ability to decode." (ECF No. 17 at 32.) The statement to which Plaintiffs refer is found at Paragraph 32 of their Statement of Facts in their Motion for Summary Judgment. The statement was made on July 8, presumably prior to the conclusion of the summer program. It in no way speaks to the efficacy of the program or the progress E.D. may or may not have made. As such, it is not material extrinsic evidence sufficient to overturn the Hearing Officer's decision.

§ 504 of the Rehabilitation Act of 1973 (“RA”), 29 U.S.C. § 701 *et seq.*, and the Americans with Disabilities Act (“ADA”). (Compl. ¶¶ 39-40.) We determined that, consistent with the Hearing Officer’s conclusion, Plaintiffs have failed to show that E.D. was denied a FAPE during the 2006-07, and 2007-08 school years. As a result, Plaintiffs are not entitled to compensatory damages. *See M.C. ex rel. J.C. v. Cent. Reg’l Sch. Dist.*, 81 F.3d 389, 396 (3d Cir. 1996) (“When an IEP fails to confer some (i.e., more than *de minimis*) educational benefit to a student, that student has been deprived of the appropriate education guaranteed by the IDEA. It seems clear, therefore, that the right to compensatory education should accrue from the point that the school district knows or should know of the IEP’s failure.”). Plaintiffs are also not entitled to expert fees as they are not the prevailing party. *See Neena S. v. Sch. Dist.*, 2009 U.S. Dist. LEXIS 65185, at *33-35 (E.D. Pa. July 27, 2009) (explaining that although expert fees are not available under the IDEA, they are recoverable under Section 504 to the prevailing party).

However, even if Plaintiffs had met their burden in showing that E.D. was denied a FAPE, compensatory damages would nevertheless be inappropriate. The recovery of compensatory damages requires a showing of intentional discrimination. *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 261 (3d Cir. 2013). The Third Circuit has held that to prove intentional discrimination, the claimant must establish deliberate indifference. *Id.* at 262-65. To prove deliberate indifference, the claimant must present evidence showing “(1) *knowledge* that a federally protected right is substantially likely to be violated . . . , and (2) *failure* to act despite that knowledge.” *Id.* at 265 (emphasis in original). “Deliberate indifference must be a deliberate choice, rather than negligence or bureaucratic inaction.” *Id.* at 263 (quotation marks and citations omitted). The standard also “requires *actual knowledge*; allegations that one would have or ‘should have known’ will not satisfy the knowledge prong of deliberate indifference.”

Id. at 266 n.26 (quoting *Bistrrian v. Levi*, 696 F.3d 352, 367 (3d Cir. 2012) (emphasis in original)).

Plaintiffs contend that they need not show deliberate indifference, but instead may rely on their claim of retaliation to show intentional discrimination. However, as explained below, Plaintiffs' retaliation claim fails. In any event, the facts contained in the record do not support a finding that Defendant acted with deliberate indifference. That evidence shows that Defendant was engaged with Plaintiffs at every stage of the placement process. Defendant's employees were in frequent contact with Plaintiffs, whether by e-mail, telephone, or in person. Defendant's employees regularly evaluated E.D. and sought to adjust her educational settings in order to meet E.D.'s needs. Defendant did not display a marked indifference towards E.D.'s personal and academic growth. Defendant attempted, in good faith, to resolve the E.D. situation in a manner that would be satisfactory to all parties. There has been no evidence submitted that supports a finding that Defendant acted with deliberate indifference or animus towards E.D. "In this context, our role is not to determine whether [Defendant] could have done a 'better' job of accommodating [E.D.'s disability]." *T.F. v. Fox Chapel Area Sch. Dist.*, 589 F. App'x 594, 601 (3d Cir. 2014) (rejecting argument that school district was deliberately indifferent to student's disability where the evidence showed that school "worked diligently with his parents to ensure his meaningful participation in educational activities and meaningful access to educational benefits").

Plaintiffs have failed to raise a genuine dispute of material fact as to the alleged intentional discrimination by Defendant. Because a showing of intentional discrimination is a necessary element to a claim for compensatory education damages, summary judgment will be granted in favor of Defendant on Count II of the Complaint.

C. Count III: Interference and Retaliation

In Count III of their Complaint, Plaintiffs seek damages for alleged interference with, and retaliation for, Plaintiffs' exercise of their procedural rights under the IDEA. Specifically, Plaintiffs claim that Defendant's decision to bar Dr. Daniel Cane, Plaintiffs' chosen expert in school psychology, from observing a Plymouth class in December 2008, interfered with Plaintiffs' ability to exercise their due process rights. Both parties move for summary judgment on Count III.

To prove a retaliation claim under Section 504, a plaintiff "must show (1) that they engaged in a protected activity, (2) that defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights, and (3) that there was a causal connection between the protected activity and the retaliatory action." *Lauren W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007). A trier of fact cannot simply "draw an inference" that Defendant engaged in retaliatory conduct. *Id.* at 270. "A defendant may defeat the claim of retaliation by showing that it would have taken the same action even if the plaintiff had not engaged in the protected activity." *Id.* at 267.

The anti-retaliation regulation implemented pursuant to Section 504 states that "[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purposes of interfering with any right or privilege secured by [the Act], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing." 34 C.F.R. § 100.7(e). The analogous regulation promulgated pursuant to Title II of the ADA employs similar language. *See* 28 C.F.R. § 35.134(b).

Plaintiffs allege that the "protected activity" with which Defendant interfered, and retaliated against them for attempting to exercise, involves the plan for Dr. Daniel Cane,

Plaintiffs' expert, to evaluate a classroom at Plymouth. According to Plaintiffs, Defendant denied Dr. Cane access to a learning support classroom in December 2008, which infringed on Plaintiffs' procedural rights under the IDEA and Section 504. Plaintiffs point to an e-mail from December 7, 2008, written by Defendant's counsel, in which Defendant denied access to Dr. Cane because "the intention of Dr. Cane's visit was for the purpose of developing an expert report for litigation purposes." (ECF No. 17-5 Tab C at 1.)

Plaintiffs point to two distinct rights which they claim are implicated by Defendant's decision to bar Dr. Cane from the learning support classroom. First, Plaintiffs point to the parents' right to an "independent educational evaluation [IEE] at public expense if the parent disagrees with an evaluation obtained by the public agency." 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b)(1); (Compl. ¶ 32). Second, Plaintiffs claim that Defendant limited their ability to obtain relevant information in advance of the due process hearing.

We will first address the possibility that Dr. Cane's planned visit to a Plymouth learning support classroom constituted a "protected activity" because it amounted to an IEE under 20 U.S.C. § 1415(b)(1) and 34 C.F.R. § 300.502(b)(1). Dr. Cane's visit would not have constituted an IEE. Section 300.502(b)(1) of the Regulations provides for evaluations of a *child*, not a specific educational program, if parents disagree with a school's evaluation of that child. Plaintiffs did not seek to have Dr. Cane evaluate E.D. They sought to evaluate the learning support classroom and educational conditions therein. E.D. would not have even attended the class. Dr. Cane's planned visit could not be a "protected activity" pursuant to this regulation. *See Clifton*, 587 F. App'x at 21 n.5 (rejecting argument that school's refusal to permit expert to evaluate program violated 20 U.S.C. § 1415(b)(1) because "[o]bservation of the proposed program while [a student] is not in attendance does not implicate this procedural right").

We will next consider the possibility that Defendant's decision to deny Dr. Cane access to the classroom prevented Plaintiffs from exercising their general procedural rights under the IDEA and Section 504. Federal regulations require that school districts establish "a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure." 34 C.F.R. § 104.36. *See Sutton v. W. Chester Area Sch. Dist.*, No. 03-3061, 2004 U.S. Dist. LEXIS 7967 at *21 (E.D. Pa. May 6, 2004). The Supreme Court has stated that the IDEA "ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition." *Schaffer v. Weast*, 546 U.S. 49, 60-61 (2005). The Supreme Court's statement in *Schaffer* was made in relation to the IEE obligation described above. It does not envision an unlimited right to expert access as Plaintiffs claim.

The denial of Plaintiffs' procedural rights in advance of a due process hearing would be improper, and would amount to infringement on a "protected activity." The regulations governing due process hearings speak of the "opportunity to examine relevant records." Plaintiffs' procedural rights do not extend so far as to require Defendant to cooperate in furnishing new evidence for litigation purposes. Neither the statutory framework, nor the regulations, nor *Schaffer* requires the sort of broad access that Plaintiffs demanded.

Plaintiffs cannot demonstrate that the activity discussed was "protected." Since Plaintiffs cannot satisfy the first requirement of a retaliation claim, we do not need to determine whether Defendant undertook a proscribed retaliatory action. Accordingly, Defendant's Motion for

Summary Judgment as to Count III will be granted.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment will be denied, and Defendant's Motion for Summary Judgment will be granted.

An appropriate order follows.

BY THE COURT:

A handwritten signature in black ink, appearing to read "R. Surrick", is written over a horizontal line.

R. BARCLAY SURRECK, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

E.D., by and through her parents, :
T.D. and C.D., and T.D. and C.D., :
individually :
 :
 : CIVIL ACTION
v. :
 : NO. 09-4837
COLONIAL SCHOOL DISTRICT :

ORDER

AND NOW, this 31st day of March, 2017, upon consideration of Defendant Colonial School District's Motion for Judgment On The Administrative Record And For Summary Judgment (ECF No. 16), and Plaintiffs E.D., T.D., and C.D.'s Motion for Summary Judgment On The Supplemented Administrative Record On Count I Of The Complaint, And Partial Summary Judgment On The Issue Of Liability On Counts II And III Of The Complaint (ECF No. 17), and all documents submitted in support thereof, or in opposition thereto, it is **ORDERED** as follows:

1. Plaintiffs' Motion is **DENIED**.
2. Defendant's Motion is **GRANTED**.
3. Judgment is hereby entered in favor of Defendant Colonial School District and against Plaintiffs E.D., T.D., and C.D.
4. The Clerk of the Court is directed to mark this case closed.

IT IS SO ORDERED.

BY THE COURT:



R. BARCLAY SURRICK, J.